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COMMENT

THE ELUSIVE APPEARANCE OF PROPRIETY: JUDICIAL DISQUALIFICATION UNDER SECTION 455

Emerging in the last decade, numerous scandals¹ involving the federal judiciary brought to the fore the need for major revisions in the 1924 Canons of Judicial Ethics² and in the federal statute which dealt with judicial disqualification.³ The House of Delegates of the American Bar Association took the first step in 1972 with its adoption of a new Code of Judicial Conduct⁴ which advocated "the appearance of justice" as the standard for judicial disqualification. However, when the Judicial Conference of the United States,⁵ the quasi-governing body of the federal

1. See *Life*, May 9, 1969 at 32, discussing how in 1966 Justice Fortas had accepted, but later returned, a \$20,000 fee from financier Louis Wolfson, who had been convicted of illegal stock dealing. See also J. P. MacKENZIE, *THE APPEARANCE OF JUSTICE* 73 (1974) [hereinafter cited as *THE APPEARANCE OF JUSTICE*]. President Nixon then nominated Clement Haynsworth to replace Fortas, but after Congress discovered Haynsworth's failure to recuse himself in two cases in which he had indirect financial involvements, his nomination was blocked. See *Brunswick Corp. v. Long*, 392 F.2d 337 (4th Cir. 1968) and *Darlington Mfg. Co. v. N.L.R.B.*, 325 F.2d 682 (4th Cir. 1963), *rev'd sub nom. Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965). See also *THE APPEARANCE OF JUSTICE*, *supra*, at xi, and *Hearings on the Nomination of Harry A. Blackmun Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 49-50 (1970) [hereinafter cited as *Blackmun Hearings*], both showing that Blackmun was qualified for the Supreme Court only after it was determined at the hearing that he had long understood better than most of his fellow judges the need for the strictest ethical code. Justice Blackmun told Senator Bayh that he interpreted the "substantial interest" clause of 28 U.S.C. §455 (1970) to mean the appearance of any bias. When he first became a judge, Blackmun had encountered an "interest" problem and had brought to the attention of the chief judge his trivial interests in a litigant before him. The chief judge determined that Blackmun should sit. See also discussion accompanying notes 18-26 *infra*, describing Justice Rehnquist's conduct in *Laird v. Tatum*, 408 U.S. 1 (1972).

2. The need for revision is noted in E. W. THODE, *REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT* 43 (1973) [hereinafter cited as *REPORTER'S NOTES*]. See also R. A. Ainsworth, Jr., *Judicial Ethics—A Crisis of Confidence*, 42 OHIO B.A.R. 1111 (1969), where Judge Ainsworth indicates that the ABA revision of the Code of Judicial Ethics was also a public relations gesture.

3. 28 U.S.C. §455 (1970).

4. ABA *CODE OF JUDICIAL CONDUCT* (1972) [hereinafter cited as *ABA CODE*]. See *REPORTER'S NOTES*, *supra* note 2, at 42.

5. In 1922, Congress, by virtue of 28 U.S.C. §331 (1970), created the Judicial Conference of the United States, which is composed of the chief judge of each circuit, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each circuit. In 1939 Congress decided that this conference was ineffective and amended the statute to

judiciary, applied this new Code of Judicial Conduct to all federal judges, it "specifically provided that its action [in adopting the new Code] did not abrogate or modify . . . conflicting provisions of [Federal] Statutes 'which [were] considered to be less restrictive than the provisions of the ABA Code.'"⁶

FEDERAL STATUTES PRIOR TO THE NEW SECTION 455

At the time the Judicial Conference adopted the ABA Code, there were three federal statutes dealing with the subject of judicial disqualification. None of these three statutes emphasized or implied that the "appearance of justice" was the important criterion in a judge's decision to disqualify himself. One statute merely prevented an appellate judge from reviewing a case he had tried as a district court judge.⁷ Another provision,⁸ applicable only to federal district court judges, appeared to make judicial disqualification mandatory when a litigant filed a timely affidavit alleging his belief⁹ that the judge had a "personal bias or prejudice either against him or in favor of the adverse party."¹⁰

A third provision,¹¹ section 455, applied to all federal judges and enu-

require the conference to meet and discuss administrative and judicial matters once a year. For a short history of the conference, see W.E. Burger, *The Courts on Trial*, 22 F.R.D. 71 (1968). But see THE APPEARANCE OF JUSTICE, *supra* note 1, at 135, and 62 CONG. REC. 201-02 (1922) where the Judicial Conference has been referred to as the "judges' lobby."

6. S. REP. No. 93-419, 93d Cong., 1st Sess. 3 (1973) [hereinafter cited as S. REP. No. 93-419].

7. 28 U.S.C. § 47 (1970).

8. *Id.* §144.

9. Under 28 U.S.C. §144 (1970), the party requesting recusal must allege facts that reveal a bias in the judge of an extrajudicial origin. See *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States v. Bolden*, 355 F.2d 453, 456 (7th Cir. 1965); *Lyons v. United States*, 325 F.2d 370, 376 (9th Cir. 1963). Only one circuit thus far has indicated that the litigant's belief in the judge's bias is sufficient for recusal. See *Parris v. Board of Comm'rs*, 505 F.2d 12, 20 (5th Cir. 1974), *Berger v. United States*, 255 U.S. 22 (1921), which held that although a judge must accept the facts enunciated in the affidavit as true, he alone determines the factual sufficiency of the affidavit. See also *United States v. Townsend*, 478 F.2d 1072 (3d Cir. 1973); *Wolfson v. Palmieri*, 396 F.2d 121 (2d Cir. 1968); *United States v. Fricke*, 261 F. 541 (S.D.N.Y. 1919); *United States v. Buck*, 18 F. Supp. 827 (W.D. Mo. 1937). Cf. *Halliday v. United States*, 389 F.2d 270 (1st Cir. 1967), *rehearing denied*, 395 U.S. 971 (1968).

10. 28 U.S.C. §144 (1970).

11. *Id.* §455:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

merated four situations in which judges should disqualify themselves. While it was easy to apply this statute in situations in which the judge had actually represented one of the parties,¹² or had been a material witness¹³ in the case before him, it was more difficult to determine the meaning of "substantial interest,"¹⁴ of "improper" conduct,¹⁵ and of disqualifying relationships.¹⁶ Besides lacking detailed and well-defined standards, section 455 failed "to provide a central underlying rationale for disqualification which could help a judge decide whether to disqualify himself in instances not expressly covered by its mandatory provisions."¹⁷

The absence of a "central rationale" in all the federal judicial disqualification statutes was emphasized by Justice Rehnquist's decision to participate in *Laird v. Tatum*.¹⁸ Mr. Justice Rehnquist justified his

12. See *United States v. Vasilick*, 160 F.2d 631 (3d Cir. 1947), where the judge could not properly act on defendant's motion to vacate judgment because he had been the prosecuting district attorney in the same case. See also *Carr v. Fife*, 156 U.S. 494 (1895); *Rose v. United States*, 295 F. 687 (4th Cir. 1924). In most cases, the phrase "of counsel" has been interpreted literally, and the judge has been disqualified only when he had actually represented the same parties who were presenting identical issues now before him. See also *Firhaber v. Sensenbrenner*, 385 F. Supp. 406, 411 (E.D.Wis. 1974).

13. To be a material witness a judge must actually be called by one of the parties. See *Borgia v. United States*, 78 F.2d 550, 554-55 (9th Cir.), cert. denied, 296 U.S. 615 (1935).

14. Judge Haynsworth, for example, did not think his indirect stock interest in the companies litigating before him represented substantial interest in *Brunswick Corp. v. Long*, 392 F.2d 337 (4th Cir. 1968) or in *Darlington Mfg. Co. v. N.L.R.B.*, 325 F.2d 682 (4th Cir. 1963). See *Hearings on the Nomination of Clement F. Haynsworth, Jr. Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 43, 99, 275-77 (1969) [hereinafter cited as *Haynsworth Nomination Hearings*]. See also G. Edwards, *Commentary on Judicial Ethics*, 38 *FORDHAM L. REV.* 259, 264-67 (1969), where Judge Edwards states that a substantial interest should be defined not only in terms of the judge's percentage of the outstanding shares in a company but also in relation to the judge's entire portfolio [hereinafter cited as *Commentary on Judicial Ethics*].

15. Although 28 U.S.C. §455 (1970) did mention "impropriety" it "made no attempt to define what is 'improper', and the experience of [the] federal judges who [had] disqualified themselves provide[d] little experience in this regard because federal judges rarely stated their reasons for disqualification." Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 *HARV. L. REV.* 736, 741 (1973) [hereinafter cited as *Federal Disqualification*].

16. The judge's confusion in determining which blood relationships and associations were disqualifying are noted in *Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (July 1971 - May 1973) [hereinafter cited as *Senate Hearings on S. 1064*].

17. *Federal Disqualification*, *supra* note 15, at 742.

18. 408 U.S. 1 (1972). In this five-four decision (in which Rehnquist voted with the majority), the Supreme Court found non-justiciable the respondents' claim that army surveillance of their civilian political activity chilled their first amendment rights. A four-

participation in that decision on the grounds that his testimony about the case before a congressional subcommittee, prior to his ascension to the Supreme Court, was merely a statement of the applicable law, and not a decision on the merits.¹⁹ Consequently, he felt his conduct was not prohibited by section 455.²⁰ Justice Rehnquist also felt that he could not be considered to have been "of counsel," since he had not actively participated, advised or pleaded the Government's case;²¹ mere association with the Justice Department did not make him privy to the case. Section 455 left the decision of disqualification solely to the judge to be disqualified,²² and Justice Rehnquist felt that he was qualified.

Because of the absence of a provision for the substitution of Supreme Court Justices,²³ Justice Rehnquist felt that he had a "duty-to-sit" if qualified or not sufficiently disqualified.²⁴ However, he did not apply prior Supreme Court cases which had tempered this duty-to-sit with the duty of maintaining the "appearance of justice."²⁵ Since Rehnquist did

four decision would have instead produced an affirmance of the court of appeals' finding of justiciability.

19. Rehnquist, J., Memorandum on Motion to Recuse, 409 U.S. 824, 834-35 (1972).

20. 28 U.S.C. §455 (1970). Rehnquist, J., Memorandum on Motion to Recuse, 409 U.S. at 828.

21. Rehnquist, J., Memorandum on Motion to Recuse, 409 U.S. at 833.

22. The Supreme Court as a matter of policy leaves the question of disqualification to the individual Justice involved and this decision is not reviewable. However, the decision of a lower court judge can be reviewed and reversed on appeal. See *U.S. Fidelity & Guaranty Co. v. Lawrenson*, 334 F.2d 464 (4th Cir.) cert. denied, 379 U.S. 869 (1964); *N.L.R.B. v. Guernsey-Muskingum Electric Co-operative*, 285 F.2d 8 (6th Cir. 1960); *Nichols-Morris, Inc. v. Morris*, 272 F.2d 586 (2d Cir. 1959). Abuse of discretion is grounds for review. See 28 U.S.C. §2106 (1959).

23. However, there is a way to "substitute" all of the Justices on the Supreme Court. This method was put to use by the Justices in *United States v. Aluminum Co.*, 320 U.S. 708 (1943). There the Supreme Court delayed disposition of the case because four Justices were disqualified and hence the Court did not have the six-justice quorum necessary for decision. Because of this problem, 15 U.S.C. §29 was amended in 1944 to provide for certification of the case to the court of appeals when there is no quorum of Supreme Court Justices qualified to participate in consideration of the case. See 15 U.S.C. §29 (1970). Consequently, this case was transferred for certification to the Court of Appeals of the Second Circuit at 322 U.S. 716 (1943) to 148 F.2d 416 (2d Cir. 1945).

24. In his Memorandum on Motion to Recuse, 409 U.S. 824, 837 (1972), Justice Rehnquist relied upon the following cases for the rule that a judge has a "duty-to-sit" where he is not disqualified: *Wolfson v. Palmieri*, 396 F.2d 121 (2d Cir. 1968); *United States v. Hoffa*, 382 F.2d 856 (6th Cir. 1967); *Tynan v. United States*, 376 F.2d 761 (D.C. Cir. 1967); *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964); *Simmons v. United States*, 302 F.2d 71 (3d Cir. 1962); *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961).

25. "[J]ustice must satisfy the appearance of justice." *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 148 (1968); *Offut v. United States*, 348 U.S. 11, 14 (1954); *In re Murchison*, 349 U.S. 133, 135 (1955).

not consider the "appearance of justice" standard nor the newly adopted ABA Code, many commentators²⁶ felt that Justice Rehnquist had followed only the bare letter and not the spirit of section 455.

In light of the public²⁷ and judicial²⁸ disapproval of Justice Rehnquist's conduct in *Laird v. Tatum*, Congress began work on an amendment to section 455 "to rescue judges from the horns of the dilemma they currently face . . ." and to reconcile the new Code of Judicial Conduct with the less stringent federal disqualification statutes.²⁹ First introduced in May 1973,³⁰ Senate Bill 1064³¹ was designed to amend section 455 so as to conform to the canons of the ABA Code of Judicial Conduct.³² The statute was specifically designed to eradicate the "dual standards, statutory and ethical, couched in uncertain language, that had the effect of forcing a judge to decide either the legal or ethical issue at his peril."³³

THE NEW SECTION 455

A. *The General Standard*

Based on the new Code of Judicial Conduct,³⁴ the amended section 455³⁵ is a substantial modification of the old statute. Unlike the prior section 455, the new statute specifically applies to magistrates, administrative judges and referees in bankruptcy as well as to judges and justices.³⁶ More importantly, the new statute also contains the general or

26. THE APPEARANCE OF JUSTICE, *supra* note 1, at 211-13. See also Note, *Justice Rehnquist's Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106 (1973); Comment, *Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455*, 71 MICH. L. REV. 538 (1973).

27. See, e.g., N.Y. Times, Oct. 11, 1972, at 1, col. 4.

28. *Senate Hearings on S. 1064*, *supra* note 16, at 89. (Statements of Justice Roger Traynor and William Westphal, Chief Counsel for the Committee).

29. *Id.* at 74. (Statement of Senator Burdick).

30. *Id.* at 73.

31. S. 1064, 93d Cong., 1st Sess. (1973).

32. ABA CODE, *supra* note 4. *Senate Hearings on S. 1064*, *supra* note 16, at 74.

33. H.R. REP. No. 93-1453, 93d Cong., 1st Sess., 2 (1973) [hereinafter cited as H.R. REP. No. 93-1453]. Because the new statute incorporates much of the literal language of the Code, the Code will be mentioned specifically only in those sections where it and the statute differ substantially.

34. ABA CODE, *supra* note 4. *Senate Hearings on S. 1064*, *supra* note 16, at 74. Because the statute is based upon the Code, the Reporter's Notes will be used to clarify those sections of the statute that Congress did not explicate.

35. 28 U.S.C.A. §455 (Supp. Feb. 1975). See Appendix I, *infra*, for text of §455. The bill to amend 28 U.S.C. §455 (1970) was enacted on December 5, 1974, and applies to any review submitted after that date as well as to proceedings commenced after that date.

36. 28 U.S.C.A. §455(a) (Supp. Feb. 1975). See 63 F.R.D. 319, 338 (1973) which made

"catch-all" provision that a judge "shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned."³⁷

This general standard is a great improvement over the old section 455, which provided no central rationale at all. Instead of permitting the judge's decision to disqualify himself to remain entirely subjective, the amended law introduces the objective standard of the "reasonable man" into the question of disqualification. In other words, although a judge may not be in fact biased, "any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned'"³⁸ would disqualify the judge.

The new standard is supposed to remove the so-called "duty-to-sit"³⁹ when the relationships or the knowledge of the judge does not fall under one of the new statute's enumerated standards.⁴⁰ Yet, the removal of this "duty-to-sit" does not allow the judge to avoid deciding difficult or controversial issues;⁴¹ he is still obligated to sit if a reasonable man cannot charge him with lack of impartiality. Thus, a limited duty to sit remains under the new section 455.

B. Disqualification for Relationship, Knowledge and Former Employment

Subsections (b)(1), (2) and (3) of the amended statute provide for the disqualification of the judge in certain specific situations. Under subsection (b)(1), a judge must disqualify himself "where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."⁴² The disqualifying bias or prejudice can be either for or against a party, can develop from prior personal relationships, and can also arise from the nature of the conduct of a party.⁴³ Under this subsection, a judge should also be cognizant of the fact that even innocent personal relationships create disqualification

the old section 455 applicable to administrative hearings.

37. 28 U.S.C.A. §455(d) (Supp. Feb. 1975).

38. *Senate Hearings on S. 1064*, *supra* note 16, at 114. See also REPORTER'S NOTES, *supra* note 2, at 60.

39. H.R. REP. NO. 93-1453, *supra* note 33. See cases note 24, *supra*.

40. H.R. REP. NO. 93-1453, *supra* note 33.

41. *Id.*

42. This section of the statute duplicates Canon 3C(1)(a) of the ABA CODE, *supra* note 4.

43. See *Senate Hearings on S. 1064*, *supra* note 16, at 46. The new statute specifically defines the relationships which had been left unclarified by the old section 455. See text accompanying notes 66-129 *infra*.

and bias problems.⁴⁴

The bias or prejudice of a judge does not have to stem merely from relationships with people or conduct but may also originate in daily experiences.⁴⁵ To the drafters of the statute, Justice Frankfurter exemplified the realization that prejudices can emanate from unvarying routines. Frankfurter disqualified himself in *Public Utilities Commission v. Pollak*,⁴⁶ a case which dealt with the constitutionality of the use of loudspeakers to transmit music and advertisements on public transportation. As a passenger of such vehicles, Justice Frankfurter stated that his "feelings [were] so engaged as a victim of the practice in controversy"⁴⁷ that he believed it better to decline participation in the case. He felt that "[when] there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves."⁴⁸

Clarifying the old statute's material witness provision,⁴⁹ subsection (b)(3)⁵⁰ indicates that a judge cannot be impartial if he has prior personal, not judicial, knowledge of the facts in dispute. Hopefully, a combination of subsections (b)(1) and (3) can eliminate the problems Justice Rehnquist faced in *Laird v. Tatum*,⁵¹ where he was accused of prejudging the case as well as being a material witness in light of his previous exposure to the case. Because the legislative history of the new statute includes references to Rehnquist's behavior, perhaps "personal knowledge of disputed evidentiary facts" will now encompass any prior extra-judicial exposure to the facts of a case.

The drafters of the statute also stated that subsection (b)(3) would not apply to a judge who had a "fixed belief" about the law applicable to a given case,⁵² but they did note that it would apply to one who had

44. H.R. REP. NO. 93-1453, *supra* note 33, at 3. *But see* *Bumpus v. Uniroyal Tire Co. Div. of Uniroyal Inc.*, 385 F. Supp. 711 (E.D.Pa. 1974) where the judge refused, under the auspices of the old statute, to disqualify himself in a case in which one of the parties was represented by an old friend and former partner.

45. *See Senate Hearings on S. 1064*, *supra* note 16, at 41-52 and 106-08. *See also* REPORTER'S NOTES, *supra* note 2, at 63, which substantiates this congressional observation.

46. 343 U.S. 451 (1952).

47. *Id.* at 467.

48. *Id.* at 466-67.

49. 28 U.S.C. §455 (1970) did not define the term, "material witness."

50. Subsection (b)(3) of the new statute provides for a judge's disqualification. 28 U.S.C.A. §455 (Supp. Feb. 1975). *See also Senate Hearings on S. 1064*, *supra* note 16, at 114-15 and REPORTER'S NOTES, *supra* note 2, at 63.

51. 408 U.S. 1 (1972). *See* notes 18-29 and accompanying text *supra*.

52. While subsection (b)(3) would not exclude, as a ground for disqualification, a judge's pre-established theory of the first amendment, it could affect a judge who had been

extra-judicial exposure to the facts of the case.⁵³ The drafters failed, however, to explain how a judge's fixed belief about the applicable law is any less pernicious to a litigant than a judge's prior exposure to the facts of a case. In one instance, the judge might apply the law only in a specific manner; in the other, he might emphasize certain facts over others. In either situation, the litigant would not be able to face, as he ought, an impartial judge.⁵⁴ Thus, while this subsection reaches biases left untouched by the old statute,⁵⁵ it still does not reach the "possible bias or prejudice of an issue. . . ."⁵⁶

The drafters recognized the vagueness of the unamended section 455's phrase "of counsel"⁵⁷ and, consequently, attempted to make that phrase more explicit in subsections (b)(2) and (3).⁵⁸ Many federal judges are

an attorney with the Justice Department. Presumably, this section, for example, would not have prevented Justice Douglas, whose views regarding the first amendment were well-known, from judging a case about pornography but would have prevented Justice Rehnquist from ruling in *Laird v. Tatum*, 408 U.S. 1 (1972).

53. *Senate Hearings on S. 1064*, *supra* note 16, at 100.

54. S. REP. NO. 93-419, *supra* note 6.

55. Under the new statute, perhaps no judge will seriously attempt to preside over a case in which a litigant's attorney is also representing the judge in another matter, as occurred in *Texaco, Inc. v. Chandler*, 354 F. 2d 655 (10th Cir. 1965). Also, the new statute might prevent a judge from ruling in a case in which he has previously indicated his dislike or admiration of a particular group, as was the case in *Berger v. United States*, 255 U.S. 22 (1921). There, prior to the trial of some Americans of German descent for sabotage, the trial judge professed to have an overwhelming dislike of Germans. The Supreme Court agreed with the petitioners that the bias of Judge Landis did deny them a fair trial. Similarly, the new statute might protect litigants in a civil rights suit from more subtle manifestations of bias. Haynsworth, for example, was criticized for deciding civil rights cases when he belonged to a segregated country club. See *Haynsworth Nomination Hearings*, *supra* note 14, at 586-87.

56. *Senate Hearings on S. 1064*, *supra* note 16, at 114. An example of issue bias appears in *Pennsylvania v. Local 542, IOUE*, 388 F. Supp. 155 (E.D. Pa. 1974), a case which was decided under the old statute. There, the defendant union claimed that the judge's background as a black scholar and advocate of civil rights gave him a bias as to the issues in a civil rights case. Judge Higginbotham claimed that his removal from the case could lead to the argument that "black judges should *per se* be disqualified from hearing cases which involve racial issues;" he also cited specific instances in which judges had ruled in cases in which they had a similar kind of interest. *Id.* at 165. However, while Judge Higginbotham's historical analysis is accurate and his reasons for remaining on the case are valid, he did fail to deal directly with the notion of issue bias and to note the criticism that Haynsworth had received for similar kinds of rulings.

57. See 28 U.S.C. § 455 (1970). *General Tire & Rubber Co. v. Watkins*, 363 F. 2d 87 (4th Cir.), *cert. denied*, 385 U. S. 899 (1966), highlights the problem of the phrase "of counsel."

58. 28 U.S.C.A. §455 (b)(2), (3) (Supp. Feb. 1975). See Appendix I, *infra*; compare Canon 3C(1)(b) of the ABA CODE, *supra* note 4, which provides:

he served as lawyer in the matter in controversy, or a lawyer with whom he

appointed to the bench from prior governmental service, and therefore, former governmental employment affects the federal judiciary more than its state counterparts.⁵⁹ Therefore, these subsections specifically apply to judges who were recruited from the public sector as well as those selected from the private sector.⁶⁰

The new federal statute does not tie the judge's previous legal employment to the "appearance of impartiality" standard.⁶¹ Instead, the statute equates the judge's prior governmental service with being a material witness, advisor, or counselor or with expressing an "opinion concerning the merits of the particular case in controversy."⁶² While isolating from the bench such prior official behavior as Rehnquist's discussion of *Laird v. Tatum* at a Senate hearing,⁶³ this definition seems to maintain the old statute's definition of "of counsel" as enunciated by Rehnquist⁶⁴ and prior case law: one is "of counsel" if he researches, pleads or assists in the preparation of a case.⁶⁵

C. Disqualification for Family and Financial Interests

The pre-1947 federal judicial disqualification statute⁶⁶ used the term

previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

While this Canon was intended to be broad enough to apply to those judges who came to the bench from private practice and government posts, its discussion of lawyers, their relationships to each other and to judges and clients, was too broad to apply to all federal judges. The Code merely notes that: "[a] lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association." REPORTER'S NOTES *supra* note 2, at 15.

59. *Senate Hearings on S. 1064*, *supra* note 16, at 15.

60. *Id.* at 114. The drafters specifically noted Justice Rehnquist's decision in *Laird* in their delineation of the public and private sectors.

61. *Id.* at 74-75. In this way the new statute differs from the Code. REPORTER'S NOTES, *supra* note 2, at 15.

62. 28 U.S.C.A. §455(b)(3) (Supp. Feb. 1975). See Appendix I, *infra*.

63. *Senate Hearings on S. 1064*, *supra* note 16, at 74-75.

64. Rehnquist, J. Memorandum on Motion to Recuse, 409 U. S. at 826-28.

65. See, e.g., *General Tire & Rubber Co. v. Watkins*, 363 F. 2d 87 (4th Cir.), *cert. denied*, 385 U. S. 899 (1966). See also *In re Grand Jury Investigation*, 486 F. 2d 1013 (3d Cir. 1973); *United States v. Wilson*, 426 F. 2d 268 (6th Cir. 1970).

66. Act of June 25, 1948, ch. 646, §455, 62 Stat. 908. See Frank, *Disqualification of Judges*, 56 YALE L. J. 605 (1947). At one point in his article, which traces the history of judicial disqualification, Mr. Frank notes that the then-current American practice was to disqualify for any financial interest. *Id.* at 613. In a later article, Frank, *Commentary on Disqualification of Judges—Canon 3C*, 1972 UTAH L. REV. 377,383-84 (1972) [hereinafter

"interest" alone as the basis for judicial disqualification. The result was that judges who had any interest, regardless of how insubstantial, recused themselves.⁶⁷ Under the old section 455⁶⁸ the word "interest" meant a substantial pecuniary interest.⁶⁹ As commentators⁷⁰ and cases⁷¹ revealed, federal judges had a difficult time in determining just what could be considered a substantial interest.⁷² Under this statute, the term substantial was relative; one's concept of substantiality was governed by what one owned.⁷³ Thus, what was substantial to one judge was trivial to another. The unamended section 455 therefore provided only conflicting definitions of substantiality and of interest.⁷⁴

Subsections (b)(4), (b)(5) and (c) of the recently amended statute⁷⁵ not only return to the pre-1947 unqualified "interest," but they go much further toward creating a clear standard. Read in conjunction with the definitions of subsection (d),⁷⁶ the new statute leaves little room for judicial doubt.

cited as *Commentary on Disqualification*], he points out that the word "substantial" did not modify "interest" until 1948.

67. *Commentary on Disqualification*, *supra* note 66, at 383.

68. 28 U. S. C. §455 (1970).

69. In *United States v. Bell*, 351 F. 2d 868 (6th Cir. 1965) and *Adams v. United States*, 302 F. 2d 307 (5th Cir. 1962), substantial interest was generally equated with pecuniary interest. See *Long v. Stites*, 63 F. 2d 855 (6th Cir. 1933), where substantial interest included a judge's interest in a bank in which he and his wife were depositors, and *Lampert v. Hollis Music, Inc.*, 105 F. Supp. 3 (E.D.N.Y. 1952), where substantial interest included a judge's insubstantial stock holding in the company-litigant before him. But see *Robertson v. United States*, 249 F. 2d 737 (5th Cir. 1957), where the meaning of substantial interest was also held to include prior knowledge of a case, an interest which in the new statute falls under subsection (b)(1).

70. See generally *Hearings on S. 1064 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 11 (1973). (Statement of John P. Frank) [hereinafter cited as *House Hearings on S. 1064*].

71. See note 69, *supra*.

72. Appearing before a senate committee to discuss proposed procedures to oversee federal judges, Judge Ainsworth of the fifth circuit pointed out that "the guidelines are not there . . . now. . . . 'Substantial interest' is not defined." *Hearings on S. 1506 et. al. Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess. 31 (1969 & 1970). [hereinafter cited as *Hearings on Judicial Machinery*].

73. *Commentary on Judicial Ethics*, *supra* note 14.

74. See note 69, *supra*.

75. 28 U.S.C. §455 (Supp. Feb. 1975). See Appendix I, *infra*. These provisions duplicate sections 3C(1)(c) and (d), and 3c(2) respectively, of the ABA Code of Judicial Conduct (1972).

76. Definitions of terms including proceeding, relationship, fiduciary, and financial interest, *inter alia*, are provided in 28 U.S.C.A. § 455(d). See Appendix I, *infra*. See also *Senate Hearings on S. 1064*, *supra* note 16, at 32-52 (Statement of John P. Frank).

Financial Interests—Subsection (b)(4)

The definition of financial interest is no longer left to conjecture and relativism. Under subsection (d), financial interest "means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party. . . ."⁷⁷ Now a judge must disqualify himself when "he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding. . . ."⁷⁸ Regardless of how impartial the judge actually is, if any financial interest can be shown, "whether the interest was that of the judge or one of specified family members,"⁷⁹ the judge must disqualify himself. Thus, subsection (b)(4) incorporates the "appearance of impartiality" as the standard for disqualification.

The new statute creates a distinction between the judge's direct and indirect financial involvements. Although the Senate committee did not want to prevent the judge from investing, it did want to prevent the judge from investing in companies that could litigate before him. By carefully avoiding certain investments, a judge could also avoid frequent disqualification.⁸⁰ But certain "indirect" interests still escape definition; for example, whether the fact that a judge is a shareholder in a company that does business with the corporation now before him represents a disqualifying interest.⁸¹ In addition, the statute makes no attempt to define the kind of additional "participation in the affairs of a party" that might also disqualify a judge; for example, whether additional participation includes being a friend, an informal advisor or a boy scout leader. The statute merely indicates that the "appearance of impropriety" remains the standard by which indirect interests are judged.⁸²

77. 28 U.S.C.A. §455(d) (Supp. Feb. 1975). See Appendix I, *infra*.

78. *Id.* §455(b)(4).

79. *Senate Hearings on S. 1064, supra* note 16, at 91-113. See also REPORTER'S NOTES, *supra* note 2, at 63-67.

80. *Senate Hearings on S. 1064, supra* note 16, at 101. Many of the witnesses at this hearing indicated that persistent disqualifications also discourage public esteem for the judiciary. See also REPORTER'S NOTES, *supra* note 2, at 66. The old statute made no effort to consider the problems of judicial investments, and consequently, a judge had a difficult time in determining which of his interests mandated recusal.

81. Witness Haynsworth's problems at *Haynsworth Nomination Hearings, supra* note 14. Haynsworth faced this problem in *Darlington Mfg. Co. v. N.L.R.B.*, 325 F.2d 682 (4th Cir. 1963), *rev'd*, 380 U.S. 263 (1965), in which he owned stock in a company that did business with one of the litigating parties.

82. *Senate Hearings on S. 1064, supra* note 16, at 99. See also REPORTER'S NOTES, *supra* note 2 at 60-61.

The drafters of the statute felt strongly that they should identify the types of investment that would not automatically lead to a judge's disqualification.⁸³ Under the statute, not all monetary interests are considered disqualifying financial interests.⁸⁴ For instance, a judge can own shares in a mutual fund that invests in securities and still preside over a case involving those securities unless he has participated in the management of the fund.⁸⁵ He can also invest in mutual insurance companies, mutual savings association and government securities so long as the value of these investments will not be "substantially affected" by the outcome of the proceeding before him.⁸⁶ Under these provisions, the key to judicial disqualification seems to be the degree of actual participation and financial involvement in the indirect investments. While the statute does not specify what constitutes "to participate" in the management⁸⁷ or to be "substantially affected" by the outcome, it does indicate that evaluation of the judge's participation will be achieved according to the terms of the general appearance of propriety standard.⁸⁸

The statute draws a distinction between the judge's financial or fiduciary interest as the director, advisor or manager⁸⁹ in a corporation, bank or business, and the judge's interest as an advisor or participant in the affairs of a school, fraternity or other organization whose primary function is not financial.⁹⁰ In the former situation, a judge is automatically disqualified; in the latter he may not be unless his impartiality may be

83. *Senate Hearings on S. 1064*, *supra* note 16, at 105. See also REPORTER'S NOTES, *supra* note 2, at 69, where the ABA committee noted that "a judge's interest as an office holder in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization" and, consequently, does not disqualify the judge on financial or fiduciary grounds.

84. This description of financial interest applies to the Code as well. See ABA CODE, *supra* note 4, Canon 3C(1)(c) and (d).

85. 28 U.S.C.A. §455(d)(4)(i) (Supp. Feb. 1975). See Appendix I, *infra*.

86. *Id.*, §§(d)(4)(iii), (iv). See Appendix I, *infra*.

87. THE APPEARANCE OF JUSTICE, *supra* note 1, at 47-58 mentions Justice Douglas' problems with respect to the Parvin Foundation, of which Douglas was a trustee. Douglas was accused of giving legal advice to the Foundation as well as being involved with the Foundation's curious financial dealings.

88. *Senate Hearings on S. 1064*, *supra* note 16, at 11-12. See also REPORTER'S NOTES, *supra* note 2, at 60-61. The Code, however, makes the application of the general standard to this situation more explicit than does the statute, which permits waiver of the general standard. See discussion on waiver of judicial disqualification, notes 130-58 and accompanying text, *infra*.

89. 28 U.S.C.A. §455(d)(4) (Supp. Feb. 1975). See Appendix I, *infra*. The ABA CODE *supra* note 4, Canon 3C(3)(c), draws the same distinctions.

90. See *Senate Hearings on S. 1064*, *supra* note 16, at 105-07. See also REPORTER'S NOTES, *supra* note 2, at 69.

reasonably questioned.⁹¹ Though this distinction is somewhat tenuous, it nonetheless creates a more realistic demarcation between the judge's genuine financial interest and his performance of a social service.⁹²

Subsection (b)(4) mandates recusal where the judge has "any other interest that could be substantially affected by the outcome of the proceeding" before him.⁹³ "This category has a broad sweep;"⁹⁴ it is intended to include indirect financial interests,⁹⁵ as well as the judge's interest as a ratepayer, taxpayer and consumer.⁹⁶ However, in order to prevent subconscious bias on the part of the judge, the rationale enunciated by Mr. Justice Frankfurter in *Public Utilities Commission v. Pollak*⁹⁷ is much more comprehensive and should have been taken into account by the drafters of the statute. Conceivably, this section would also apply to situations in which a litigant before the judge was not a previous law partner or associate but simply had prior business dealings with the judge.⁹⁸

Although "[a] judge should disqualify himself if the outcome of the proceedings could substantially affect his interests as a customer [or] as a taxpayer,"⁹⁹ this "substantially affected" test provides little guidance for the judge. By using the vague term "substantial," the drafters

91. See *Senate Hearings on S. 1064*, *supra* note 16, at 11-12. See also REPORTER'S NOTES, *supra* note 2, at 69.

92. In most cases, no distinction was made between social service and business interests. See authorities cited in note 69, *supra*. See also *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 324 F. Supp. 1371 (S.D. Tex. 1969), *aff'd*, 441 F.2d 631 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971), for the proposition that the term substantial interest is primarily concerned with pecuniary and beneficial interests. But see *Roberson v. United States*, 249 F.2d 737 (5th Cir. 1957).

93. 28 U.S.C.A. § 455(b)(4) (Supp. Feb. 1975) See Appendix I, *infra* ABA CODE, *supra* note 4, Canon 3C(1)(C), is identical.

94. *Senate Hearings on S. 1064*, *supra* note 16, at 103.

95. *Federal Disqualification*, *supra* note 15, at 752-53.

96. *Senate Hearings on S. 1064*, *supra* note 16, at 103.

97. 343 U.S. 451, 466 (1952). See notes 46-48 and accompanying text *supra*.

98. See *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), where the Supreme Court disqualified an arbitrator for not disclosing to all the parties his earlier business relationship with one of the parties. The Court stated that the issue in the case was "whether elementary requirements of impartiality taken for granted in every judicial proceedings are suspended when the parties agree to resolve a dispute through arbitration." *Id.* at 145. Comparing §18 of the Rules of the American Arbitration Association to § 33 of the (old) Canons of Judicial Ethics, the Court concluded that the two guidelines required that both an arbitrator and a judge "avoid even the appearance of bias." *Id.* at 150. Consequently, the Court voided the arbitrator's decision because his non-disclosure of prior business dealings with one of the parties to the arbitration violated the appearance of impartiality.

99. *Senate Hearings on S. 1064*, *supra* note 16, at 103.

of the statute have made this interest inferior to the other indirect financial interests that a judge may have. In doing so, the drafters have inadvertently recreated the very problem they sought to eliminate, namely the absence of a concrete meaning for the vague term "substantial." Instead of using the "substantially affected" test, the drafters could have defined interest in terms of an examination of circumstances and relationships, a standard espoused by the Supreme Court in 1955.¹⁰⁰ Such a standard would pierce the disqualifying aspects of an indirect relationship or interest rather than merely indicate that a consideration of the interest should be made.

Family Interests—Subsections (b)(5) and (c)

Under the prior statute, the judge could sit in a proceeding in which a distant relative or friend was appearing as either a party litigant or legal representative,¹⁰¹ but he was required to disqualify himself when one of the parties or legal representatives before him was within the fourth degree of consanguinity.¹⁰² Case law, however, did not discuss the problem of a judge ruling in a case in which one of the litigants was connected to him in a less lineal way, as are, for example, in-laws and a spouse's relatives. Because of this oversight, the Senate committee considered the "near relative" standard too vague¹⁰³ and felt that a relative as a party was only part of the problem.¹⁰⁴ Therefore, the drafters of the statute expanded the disqualification standard.¹⁰⁵

The new family disqualification standard, subsection (b)(5),¹⁰⁶ makes

100. *In re Murchison*, 349 U.S. 133 (1955). Murchison and others were called as witnesses before a judge who was a then-lawful one man grand jury. The judge cited them for contempt for not answering certain questions, and then tried and convicted them. The Supreme Court voided their conviction, saying:

[N]o man is permitted to try cases where he has an interest in the outcome.

That interest cannot be defined with precision. Circumstances and relationships must be considered.

Id. at 136. Despite this binding definition of interest, most district and circuit courts still defined interest in the traditional manner. See *Senate Hearings on S. 1064*, *supra* note 16, at 101.

101. *THE APPEARANCE OF JUSTICE*, *supra* note 1, at 99-101.

102. *In re Eatonton Elec. Co.*, 120 F. 1010, 1012 (S.D. Ga. 1903); *In re Fox West Coast Theaters*, 25 F. Supp. 250 (S.D. Cal. 1933), *aff'd*, 88 F.2d 212 (9th Cir. 1937).

103. *Senate Hearings on S. 1064*, *supra* note 16, at 104.

104. *REPORTER'S NOTES*, *supra* note 2, at 67.

105. *Senate Hearings on S. 1064*, *supra* note 16, at 104. At the hearing, Wayne Thode also noted that "[t]he relationship disqualification standard applies in the same manner to a judge's relatives, to a judge's spouse's relatives, and to the spouses of all the foregoing relatives." *Id.* at 96.

106. 28 U.S.C.A. § 455(b)(5) (Supp. Feb. 1975). See Appendix I, *infra*.

judicial recusal necessary when any person "within the third degree of relationship"¹⁰⁷ to the judge or his spouse is a party or an officer, director or trustee to the party in the proceeding; is a lawyer or, to the judge's knowledge, likely to be a material witness in the proceeding; or is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.¹⁰⁸ Thus, the new subsection deals with relationships which the prior statute termed as "so related to or connected with any party of his attorney as to render it improper, [for the judge] to sit. . . ."¹⁰⁹

Although the statute mandates recusal where "near relatives" are involved, the Senate hearings suggest that the judge need not automatically disqualify himself merely because a near relative is affiliated with a firm involved in litigation before him.¹¹⁰ The committee felt that such "broad disqualification is not justified."¹¹¹ It did indicate, however, that a judge should recuse himself where the "lawyer-relative's interest in the law firm could be substantially affected" by the judge's decision.¹¹² Despite the fact that this new subsection does not totally clarify the meaning of substantial interest, it might prevent problems that arose under the old statute.¹¹³ For example, under the new subsection, if the trustee

107. In *Senate Hearings on S. 1064*, *supra* note 16, at 98, the committee reprinted a chart which listed the degrees of relationship. At that hearing, Wayne Thode noted:

[T]he method of determining the degree of relationship between a judge and a person whose relationship with the judge may disqualify the judge . . . [is] to count . . . from the judge to the common ancestor and from the common ancestor to the person whose relationship raises the issue. For example, if the issue is raised by the judge's relationship with X, a son of the judge's father's brother, the counting of degrees would be as follows:

The judge's father is related in the first degree; his father's father, the common ancestor, in the second degree; the father's brother, in the third degree; and the brother's son, X, is related to the judge in the fourth degree.

Id. at 96. The REPORTER'S NOTES, *supra* note 2, at 16, states that "the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding."

108. 28 U.S.C.A. § 455(b)(5) (Supp. Feb. 1975). See Appendix I, *infra*.

109. Ch. 646 § 455, 62 Stat. 908 (1948) as amended 28 U.S.C. § 455 (1970).

110. *Senate Hearings on S. 1064*, *supra* note 16, at 96.

111. *Id.*

112. *Id.*

113. See *In re Four Seasons Sec. Law Litigation*, 328 F. Supp. 221 (Judicial Panel of Multi-district Litigation 1971), where Judge Bohannon appointed Edward Barth as co-counsel to the trustee. At that time, Barth was a partner in a firm in which Judge Bohannon's son was also a partner. In this case, Judge Bohannon did not recuse himself but Barth did resign. See also THE APPEARANCE OF JUSTICE, *supra* note 1, at 104-08, which details the irregularities of these arrangements. See also *Kinnear-Weed Corp. v. Humble*

in bankruptcy of a litigant was a member of a firm in which the judge's son was a partner, this would constitute a substantial interest mandating judicial disqualification; whereas under the narrower "near relative" standard of the prior statute, there was no mandate for disqualification in the same situation and only a judge who was very sensitive about the spirit of the law would recuse himself.

Besides clarifying the terms interest and relations, the new statute demands a kind of self-knowledge and awareness on the part of the judge that was absent from the old section 455.¹¹⁴ Previously, the judge did not have to know about his financial holdings.¹¹⁵ Under the new statute's subsection (c), the judge has a duty to "inform himself about his personal and fiduciary financial interests and make a reasonable effort to inform himself about the financial interests of his spouse and minor children . . . in his household."¹¹⁶ Although this duty is voluntary rather than mandatory, discussion at the Senate hearings indicates that the judge who fails to keep currently informed about his financial and fiduciary relationships "should be subject to sanctions for violation of that provision."¹¹⁷

Although subsection (c) seeks to establish an affirmative duty to make oneself aware of one's own assets,¹¹⁸ the judge need only make a

Oil & Refining Co., 403 F.2d 437 (5th Cir. 1968) for an example of what John P. Frank and others have called the "velvet blackjack." Here, the judges' wives had financial holdings in one of the litigant companies and one judge leased property to it. Although the judges concluded that they were not disqualified for "interest" under the former § 455 (1970), they nonetheless recused themselves. This case illustrates just one of the many problems resulting from the old statute's vagueness. As MacKenzie says in *THE APPEARANCE OF JUSTICE*, *supra* note 1, at 97:

Essentially, the Velvet Blackjack is a game based on assumed relationships of mutual confidence; it is, in other words, a species of confidence game . . . the victim must decide not only whether to repose his trust in the individual, but more humanly wrenching, he must weigh the consequences of betraying apparent distrust and the risks of offending the other party. When the other party is a black-robed judge and the decision falls upon the lawyer, there is an extra dimension of human difficulty: the technical vulnerability of the judge.

114. This description applies to the Code of Judicial Conduct as well as to the new statute. *See Senate Hearings on S. 1064*, *supra* note 16, at 104-05. *See also House Hearings on S. 1064*, *supra* note 70, at 7.

115. Ch. 646 §455, 62 Stat. 908 (1948) as amended 28 U.S.C.A. §455 (Supp. Feb. 1975).

116. 28 U.S.C.A. §455(c) (Supp. Feb. 1975) is identical to Canon 3C(2) of the ABA CODE, *supra* note 4. *See Appendix I, infra*.

117. *Senate Hearings on S. 1064*, *supra* note 16, at 104. *See REPORTER'S NOTES*, *supra* note 2, at 68, for similar comments made by the ABA committee. Neither the ABA nor the Senate committee ventured to say what those sanctions should be and who should enforce them. *See also* the discussion regarding enforcement of the Statute and the Code, notes 167-84 and accompanying text, *infra*.

118. In *Kinnear-Weed Co. v. Humble Oil & Refining Co.*, 403 F.2d 437 (5th Cir. 1968),

"reasonable effort" to ascertain the personal financial interest of his spouse and minor children. The drafters of the statute wanted to distinguish a judge's knowledge of his own finances from those of his children and spouse because they felt that a judge should "not be forced to demand and obtain information about the affairs of his spouse and minor children residing in his household"¹¹⁹ in order to preserve the appearance of impartiality.¹²⁰ Therefore, only a reasonable effort to learn about their finances is necessary.¹²¹ Moreover, the judge's reasonable efforts are directed toward only the personal finances of his spouse and minor children; he does not have to make any effort to determine the nature of their business interests, nor examine any interests of the adult members of his family who might reside in his household.¹²² However, the Senate's hypothetical reasonable man probably would have found highly suspicious the fact that a judge could remain ignorant of the personal finances of those who reside with him.¹²³ But the Senate subcommittee's reasons for sanctioning such ignorance did not address this incongruity; it felt that a judge does not have any influence or control over his adult offspring, nor would they have any influence over the judge.¹²⁴ This vision, however, does not comport with reality; adult children's behavior can have an influence over their parents, even if one parent is a judge.¹²⁵ Consequently, a judge's dubious ignorance of his

the judges claimed to be unaware of their rather substantial interests in the parties before them. Judge Haynsworth also was unaware of his Brunswick stock holdings until the decision in that case was in final form. *Brunswick Corp. v. Long*, 392 F.2d 337 (4th Cir. 1968).

119. *Senate Hearings on S. 1064*, *supra* note 16, at 104-05. See also REPORTER'S NOTES, *supra* note 2, at 68.

120. *Senate Hearings on S. 1064*, *supra* note 16, at 104. See also REPORTER'S NOTES, *supra* note 2, at 68.

121. S. REP. NO. 93-419, *supra* note 6, at 6.

122. *Senate Hearings on S. 1064*, *supra* note 16, at 104. See also REPORTER'S NOTES, *supra* note 2, at 68.

123. *Senate Hearings on S. 1064*, *supra* note 16, at 76, 93. The REPORTER'S NOTES, *supra* note 2, at 60, indicate that this standard for judicial disqualification is "[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned. . . ." In light of this standard, the Code committee seems to take an inconsistent stance in regard to the judge's environment.

124. *Senate Hearings on S. 1064*, *supra* note 16, at 101. See also REPORTER'S NOTES, *supra* note 2, at 67-68.

125. See, e.g., *Estate of McDonald*, 128 Cal. App. 2d 719, 275 P.2d 917 (1954); *In re Estate of Crawford*, 176 Kan. 537, 271 P.2d 240 (1954); *Gaver v. Gaver*, 176 Md. 171, 4 A.2d 132 (1939); *Capozzi v. Capozzi*, 1 N.J. 523, 64 A.2d 433 (1949), for a recognition of children's undue influence over parents, especially where a relationship of trust and confidence exists. See also 10 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 233 (D.

family's finances would certainly amount to an appearance of impropriety.

While the Senate's distinction between personal and other financial interests does not seem justified,¹²⁶ the committee did list criteria by which the reasonableness of the judge's efforts to learn of such interest can be measured. This list looks to the origin and nature of the spouse's or minor child's interest, and the judge's prior supervision of it.¹²⁷ However, the criteria do not determine the reasonableness of the judge's ignorance of the others within his household, although these other interests are often both substantial and influential¹²⁸ and should require disqualification of the judge.

D. Waiver of Disqualification

Similar to the stipulation by attorneys regarding evidentiary rules¹²⁹ and findings of fact,¹³⁰ the otherwise mandated disqualification of a judge under the new section 455 may be stipulated by the parties under

Sills ed. 1968), where the author indicates that middle class parents are more permissive toward their children's expressed needs and wishes.

126. This action also seems to be inconsistent with Canon 2 of the ABA CODE, *supra* note 4, which states: "A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgement. . . ."

127. The REPORTER'S NOTES, *supra* note 4, at 68, establish the following criteria to determine whether a judge has made "reasonable efforts" to learn of the financial interests of his spouse and minor children:

Did the interest of the spouse or child come from the judge or from another source? Does the spouse or child know the nature of the interest, or is he or she the beneficiary of a blind trust? Has the spouse's or child's financial interest been supervised by the judge in the past, or has the judge not been involved in the handling of the interest?

It is important to note, however, that the new statute does not *explicitly* adopt these criteria, although they were mentioned at the hearings. See *Senate Hearings on S. 1064*, *supra* note 16, at 101-02.

128. See note 113, *supra*. Although it is possible that Judge Bohannon's son had no influence over his father, the reasonable man would have viewed this situation with suspicion. The judge violated the appearance of justice standard. THE APPEARANCE OF JUSTICE, *supra* note 1, at 104.

129. It is generally within the power of attorneys to stipulate as to matters of evidence. See *Kneeland v. Luce*, 141 U.S. 437 (1891); *Mutual Life Ins. Co. v. Harris*, 97 U.S. 331 (1877). When parties stipulate to such matters, they are in fact waiving their right to a court determination.

130. See, e.g., *Clason v. Matko*, 223 U.S. 646 (1912) and *H. Hackfeld & Co. v. United States*, 197 U.S. 442 (1904), which show how litigants and their attorneys may stipulate as to certain facts in a case which in essence amounts to a waiver of their right to contest the facts.

subsection (e).¹³¹ However, unlike other kinds of stipulation, waiver of judicial disqualification may be more often the result of the trial judge's subtle coercion.¹³² Thus, waiver of disqualification may appease the judge at the expense of injury to one or both of the parties.

The waiver language of amended section 455 diverges substantially from that of the ABA Code of Judicial Conduct.¹³³ These divergences hardly improve the flaws of the Code and, in some respects, even aggravate its weaknesses. Consequently, a detailed comparison of these passages¹³⁴ will reveal that the net effect of this alteration may negate the balance of the statute's requirements for disqualification.

Although the prior statute¹³⁵ did not expressly provide for waiver, most federal courts did allow any disqualification of judges to be waived by the parties.¹³⁶ Under the ABA Code of Judicial Conduct, certain causes for disqualification may not be waived. According to the Code, while a party may not waive the appearance of justice standard, nor bias, prejudice or prior knowledge, he may waive disqualification for the judge's personal relationships or financial interests.¹³⁷ In addition, the Code states that this waiver also applies to relatives of the judge's spouse.¹³⁸ Such a waiver may be made only if the judge discloses his

131. 28 U.S.C.A. §455(e) (Supp. Feb. 1975). See Appendix I, *infra*.

132. See note 113, *supra*, which discusses the "velvet blackjack."

133. Compare 28 U.S.C.A. §455(e) (Supp. Feb. 1975) (See Appendix I, *infra*), with Canon 3D, ABA CODE OF JUDICIAL CONDUCT (1972) which provides that a judge who is disqualified for family financial interests, Canon 3C(1)(c), or for the "near relative" standard Canon 3C(1)(d)

may instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

134. See *id.*

135. Ch. 646 §455, 62 Stat. 908 (1948) as amended 28 U.S.C.A. §455 (Supp. Feb. 1975).

136. See *Adams v. United States*, 302 F.2d 307 (5th Cir. 1962) (a substantial interest of a judge may be waived); *Ramirez v. United States*, 294 F.2d 277 (9th Cir. 1961) (where defendant had not made a timely objection, he had waived his right to protest interest); *Coltrane v. Templeton*, 106 F. 370 (4th Cir. 1901) (where all the facts are known, a waiver was valid even though the judge had a substantial interest). But see *United States v. Amerine*, 411 F.2d 1130 (6th Cir. 1969) (where a waiver of disqualification was disallowed because the court claimed that the statute was mandatory); *In re Eatonton Elec. Co.*, 120 F. 1010 (D.C.Ga. 1903) (although a disqualification based upon relationship could be waived, it should not be).

137. See ABA CODE OF JUDICIAL CONDUCT, (1972), Canon 3D, *supra* note 133.

138. REPORTER'S NOTES, *supra* note 2, at 60. The question remains whether the waiver should not also apply to the judge's business acquaintances and friends. While a judge

possible disqualification on the record, and the parties and their attorneys, "independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial."¹³⁹ After such agreement is signed by all the parties and their attorneys, it is added to the court record. Then the judge is no longer disqualified and the proceeding may continue.

Under the Code, the waiver provision cannot be used at all if the judge is not willing to proceed.¹⁴⁰ However, if the judge is willing to participate, he indicates his willingness by disclosing on the record the basis of his disqualification.¹⁴¹ According to the Code, the judge need not show how he reached his decision; he merely has to show that he made it. For example, he has only to declare that his stock interest in the proceeding is insubstantial without having to disclose the number of shares he holds in that company.¹⁴²

Since the "judge is neither required to nor expected to file a full accounting of his financial assets to aid the parties and attorneys in making their decision,"¹⁴³ it is difficult for the parties to make a rational decision. Further, the lack of a full disclosure record will provide little guidance for other judges on the question of recusal. In addition, since it is the judge himself who determines the insubstantiality of his financial interest or impartiality, the parties and their attorneys, without records, will never be able to make a knowing waiver.

Moreover, the fact that the Code permits the judge to rule on these matters himself, interjects the very subjectivity which the Code, by formulating the objective "appearance of justice" standard, sought to avoid.¹⁴⁴ By allowing the judge to rule on his own impartiality, this provision violates one of the fundamental tenets of our law: that "no man is permitted to try cases as a judge where he has an interest in the outcome."¹⁴⁵ Surely, a judge has an interest in the outcome of a proceed-

may be able to divorce his personal relationships from his judicial decisions, the litigant who must face the judge's friends in court may not believe that the judge can decide fairly. Perhaps the solution here is to mandate recusal whenever such a situation occurs.

139. ABA CODE OF JUDICIAL CONDUCT (1972), Canon 3D, *supra* note 133. The ABA committee's comments to Canon 3D indicate that hardship to litigants who would not be able to substitute judges was a major consideration in the creation of this waiver provision. See REPORTER'S NOTES, *supra* note 2, at 71.

140. REPORTER'S NOTES, *supra* note 2, at 71.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. See *In re Murchison*, 349 U.S. 133 (1955); *Ofutt v. United States*, 348 U.S. 11 (1954); *Tumey v. Ohio*, 273 U.S. 510 (1927). See also *Dr. Bonham's Case*, 77 Eng. Rep. 646 (K.B. 1609).

ing in which his impartiality is questioned.¹⁴⁶

The ABA Code's waiver provision is expressly designed "to protect the judge from a claim of judicial misconduct"¹⁴⁷ rather than to aid the parties or "guarantee the validity of the decision."¹⁴⁸ However, it is difficult to see how this provision, which allows the judge to rule on disqualification, will avoid judicial misconduct. Furthermore, even if the judge is not an intimate participant of the decision to waive or not to waive disqualification, the old "velvet blackjack"¹⁴⁹ will still be swung, especially if the lawyer appears often before the same judge.

Subsection (e) encounters some of the same problems as does its ABA counterpart along with creating new ones. While the ABA Code permits the parties to waive the judge's disqualification for his and his immediate family's financial interests and his near relationships, the federal statute mandates disqualification for those same interests, as well as for prior knowledge and former employment.¹⁵⁰ On the other hand, subsection (e) allows a judge to accept a waiver in the most critical situation of all—where the appearance of impartiality might be reasonably questioned by the reasonable man.¹⁵¹

The federal provision for the waiver of the appearance of impartiality states that "waiver may be accepted [when] it is preceded by a full disclosure on the record of the basis for disqualification."¹⁵² Though this provision is silent as to procedure, the waiver procedure will probably be the same as that in the Code of Judicial Conduct.¹⁵³ First, the judge will disclose the basis of his disqualification for apparent partiality and then the parties and attorneys will decide whether or not to waive.

146. Neither the statute nor the Code makes clear how the judge's disqualification comes about. As under 28 U.S.C. §144 (1970), *see* note 8 and accompanying text *supra*, the party will probably make a motion to have the judge recuse himself. However, it is also possible that under both the Code and the statute, the mandatory language requires that the judge recuse himself without motions by any of the parties.

147. REPORTER'S NOTES, *supra* note 2, at 72.

148. *Id.* at 73.

149. John Frank, in *Senate Hearings on S. 1064*, *supra* note 16, at 115, described the use of this weapon: "The practicalities of life are that waiver can be a kind of *velvet blackjack* in which the lawyer who is going to appear before the same judge at another time really has very little choice" (emphasis added). *See also* note 113, *supra*.

150. 28 U.S.C.A. §455(e) (Supp. Feb. 1975). *See also*, S. REP. No. 93-419, *supra* note 6.

151. 28 U.S.C.A. §455(e) (Supp. Feb. 1975). *See* Appendix I, *infra*.

152. *Id.* The ABA CODE OF JUDICIAL CONDUCT (1972), however, does *not* require full disclosure.

153. This assumption is reasonable in light of the fact that §455 was based on the ABA Code. Moreover, the Judicial Conference has adopted the Code. *See* note 7, *supra*. *See also* H.R. REP. No. 93-1453, *supra* note 33, at 11, where the committee report suggests that such procedure be followed.

Obviously, the reasons for the appearances of the "velvet blackjack"¹⁵⁴ parallel those in the Code of Judicial Conduct. Further, because the federal statute does not specify the proceeding through which the waiver is executed, it is possible that disqualification may be waived by the attorneys without the knowledge or approval of the litigants.¹⁵⁵ If this is the case, the likelihood of judicial pressure upon an attorney to waive disqualification will be even stronger.¹⁵⁶ Moreover, the fact that the appearance of justice standard of subsection (a) is waivable makes this new statute susceptible to the critical weakness of the old; that it too lacks a central, coherent guideline for federal judges to follow.

A major difference between the federal statute and the Code of Judicial Conduct is one of language. The Code of Judicial Conduct states that: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where [list of situations follows]"¹⁵⁷ On the other hand, the federal statute declares that a judge "shall *also* disqualify himself in the following circumstances"¹⁵⁸ While this terminological difference might at first seem trivial, in reality this variance is crucial. By specifically indicating that the list of disqualifying instances is not exclusive, the Code of Judicial Conduct emphasizes that its provisions cannot—and are not meant to be—the only standards for judicial disqualification. The Code seems to demand that the judge look beyond the four corners of a list which cannot exhaust all the situations he might encounter in determining his ultimate impartiality. In contrast to the Code, section 455's language indicates that its provisions are exhaustive. A judge need not look beyond the statute—and the waivable appearance of propriety standard—to determine his own qualifications. The guidelines for judicial disqualification under the federal statute are therefore seriously limited in their ability to accomodate future, unforeseen biases and conflicts of interest that may face the judiciary.

E. Unresolved Problems

The promulgation of the new federal statute for judicial disqualifica-

154. See note 113, *supra*.

155. REPORTER'S NOTES, *supra* note 2, at 73, indicated that the signatures of the litigants should be required to "reduce the likelihood that a waiver agreement will be entered into because of judicial pressure." The Senate hearings are silent about whether this procedure is to be used under the statute. However, the Code's method of waiver is mentioned at the *Senate Hearings on S. 1064*, *supra* note 16, at 115.

156. REPORTER'S NOTES, *supra* note 2, at 73.

157. ABA CODE, *supra* note 4, Canon 3C (emphasis added).

158. 28 U.S.C.A. §455(b) (Supp. Feb. 1975) (emphasis added). See Appendix I, *infra*.

tion marks the creation of higher and firmer public expectations of judicial ethics.¹⁵⁹ The statute,¹⁶⁰ patterned after the Code of Judicial Conduct,¹⁶¹ espouses the "appearance of justice" as the general guideline for judicial disqualification and then enumerates various involvements that mandate the judge's recusal. The enunciation of specific areas of mandatory disqualification is a great improvement over the vague older statute and judicial canons. However, the far-reaching "appearance of justice" standard does not obliterate the use of the "velvet blackjack" and is not broad enough to cover unforeseen problems. An example of this inadequacy, mentioned earlier,¹⁶² is the fact that neither the Code of Judicial Conduct nor the new statute makes any explicit provision for possible bias with respect to an issue.¹⁶³ While the Code's list of disqualifying instances and nonwaivable "appearance of justice" standard might be able to reach this kind of bias, the statute, whose list will be construed as exhaustive, will not necessarily mandate disqualification in cases where a judge's issue-bias is established by his pre-elevation activities and writings. Further, the statute's general standard is waivable and thus might not afford relief to the unwary litigant.

In addition, though the statute enunciates the appearance of impropriety as a general standard for judicial recusal, it does not explain its meaning. The legislative history of the statute suggests that this standard is determined by reference to the reasonable man,¹⁶⁴ but nowhere does the legislative history indicate how the reasonable man judges impropriety or the appearance thereof. Since the statute's ethical provision has not provided any factual or concrete examples of the "appearance of impropriety," perhaps all that the standard really accomplishes is to make a judge "the victim of the appearance of impropriety"¹⁶⁵ The fact that the judge rules on his own propriety makes the general standard even more difficult to define.

The enforceability of the "appearance of justice" standard is another problem facing the new statute and the Code. In the case of the Code of Judicial Conduct, the standard cannot be enforced unless all jurisdictions adopt the Code and "establish effective disciplinary procedures for

159. See, e.g., *Senate Hearings on S. 1064*, *supra* note 16.

160. 28 U.S.C.A. §455 (Supp. Feb. 1975). See Appendix I, *infra*.

161. See notes 133 and 58. ABA CODE, *supra* note 9.

162. See discussion in text accompanying notes 43-56, *supra*.

163. See discussion in text accompanying notes 34-41, *supra*.

164. *Senate Hearings on S. 1064*, *supra* note 16, at 95. See also REPORTER'S NOTES, *supra* note 2, at 60.

165. J. C. GOULDEN, *THE BENCHWARMERS* 294 (1974) [hereinafter cited as *THE BENCHWARMERS*].

its enforcement.”¹⁶⁶ Thus, the individual states¹⁶⁷ have the ultimate responsibility for adoption and enforcement of the Code of Judicial Conduct. The states, through statutory and constitutional provisions, can regulate judicial conduct of state judges in a manner which would be impossible under the protections given to federal judges.¹⁶⁸

While the several states can establish commissions and internal judicial sanctions against wayward judges,¹⁶⁹ it is far from certain that any particular body, other than Congress via the impeachment powers, has the power to regulate the conduct of federal judges.¹⁷⁰ Therefore, even though the Judicial Conference of the United States has adopted the new Code,¹⁷¹ the ability of that body to enforce the ABA standard is in doubt.¹⁷² While the Act establishing the Judicial Conference¹⁷³ is not a model of clarity,¹⁷⁴ recent statutory attempts to clarify its enforcement

166. Preface to the ABA CODE OF JUDICIAL CONDUCT (1972).

167. *Id.* See R. J. Martineau, *Enforcement of Judicial Conduct*, 1972 UTAH L. REV. 410 (1972) [hereinafter cited as *Enforcement of Judicial Conduct*].

168. *Id.* at 416. Martineau points out that while there are a number of state agencies—the legislature, the supreme court, the discipline committee and the governor—which can regulate state judges, the Supreme Court of the United States has not exercised any of its authority over federal judges. “In the federal system neither the circuit judicial council nor the Judicial Conference is a court and thus probably lacks the contempt power” over judges. *Id.* at 417. See also *Hearings on the Independence of Federal Judges Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 932 (1970) [hereinafter cited as *Hearings on Judicial Independence*], where one commentator states that the independence of federal judges “means that judges do their duty as they see it without accounting to any higher power [save] the Congress, and then only to the extent provided by Article II, Section 4, and Article I, Sections 2 and 3. . . .”

169. *Hearings on Judicial Independence*, *supra* note 168, at 932.

170. Congress can impeach federal judges for high crimes and misdemeanors, art. II, §4, or for lack of good behavior, art. III, §1. But no one is certain of the meaning of “good behavior.” See THE BENCHWARMERS, *supra* note 165, at 292. See also R. CRAMER & J. BARRON, THE CONSTITUTIONALITY OF REMOVAL AND MANDATORY REQUIREMENT PROCEDURES FOR THE FEDERAL JUDICIARY, SELECTED READINGS IN JUDICIAL DISCIPLINE AND REMOVAL (1973).

171. See notes 5 and 6, *supra*.

172. *Enforcement of Judicial Conduct*, *supra* note 167, at 416-17.

173. 28 U.S.C. §331 (1970) sets up the Judicial Conference of the United States which is composed of the chief judge of each circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each circuit. 28 U.S.C. §332 (1971) creates the Judicial Council for each circuit. “Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit.” The council must write reports for the administrative office of the courts. 28 U.S.C. §333 (1970) is the enabling act for the judicial conferences of the circuits. Its functions are not clearly distinguished from those of the judicial council because §333 also provides for meetings to consider “means of improving the administration of justice with [each] circuit.” See note 5, *supra*.

174. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 85 n.6 (1970).

power have been thwarted¹⁷⁵ under the strong influence of the federal judiciary. The Supreme Court indicated in dicta in a 1970 case¹⁷⁶ that the judicial conference of a circuit can instigate and enforce certain disciplinary actions against a district court judge, but it refused to rule on that issue and declared the case was non-justiciable.¹⁷⁷ Thus, neither Congress nor the Supreme Court has authorized the Judicial Conference to regulate the ethics of the federal bench.

Another problem in regulating the federal, as opposed to the state, judiciary is a more entrenched tradition of separation of powers¹⁷⁸ and an independent judiciary on the national level.¹⁷⁹ In addition, the "greater legislative involvement in the administration of justice that exists under the Federal Constitution as opposed to the state constitutions"¹⁸⁰ makes federal enforcement of any regulation difficult.¹⁸¹ One recent observer has pungently noted that "no force on earth can compel a judge to work . . ."¹⁸² if he chooses not to do so. As this essay has demonstrated, "the federal judiciary is . . . particularly exempt from outside scrutiny."¹⁸³

CONCLUSION

The narrower coverage of the new federal statute magnifies the problem of enforcing the Code of Judicial Conduct against the federal judiciary. Under the statute, an unwary litigant may waive the appearance of justice standard, and once the judge rules on the case, not even an appeal can correct deficiencies in the appearance of justice. A court of appeals can only overrule, not regulate.¹⁸⁴ However, were there a body

175. Senate Bill 1506 would have created a "Commission on Judicial Disabilities and Tenure" which would have had the power to investigate, upon complaint, whether the conduct of a judge had been consistent with the good behavior required by art. III of the Constitution. See *Hearings on S. 1506, 1507, 1508, 1509, 1510 et al. Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2nd Sess. 48-49 (Nov. 1969—Apr. 1970).

176. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970).

177. *Id.* at 84-89.

178. *Id.* at 136 (Douglas, J., dissenting).

179. *Enforcement of Judicial Conduct*, *supra* note 167, at 416.

180. *Id.*

181. See the letter appended to *Hearings on Judicial Machinery*, *supra* note 72, at 33, for a judicial denunciation of any regulation of judicial behavior.

182. *THE BENCHWARMERS*, *supra* note 165, at 6.

183. *Id.* at 15.

184. 28 U.S.C. §1291 (1970) provides for appellate court review of final decisions of district courts. This power of review does not, however, allow the court of appeals to censure the district court judge.

that could enforce a code of ethics, the unethical judge could be disciplined, and enforcement of the ethical standard would for the first time occur.

Although the new Code and statute provide more explicit standards for judicial disqualification, they are not explicit enough to accomodate future challenges to judicial impartiality. Moreover, the unenforceability of "above reproach" judicial conduct dampens the gunpowder of the Code and statute. Until the federal judiciary and Congress work together within the confines of the Constitution to provide a body to administer an ethical standard, the ammunition provided by the Code of Judicial Conduct and the judicial disqualifications statute will fall short of the target of an even-handed federal judiciary.

Sharon Turkish Jacobson

APPENDIX I

28 U.S.C.A. § 455 (Supp. Feb. 1975) provides:

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which this impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) “fiduciary” includes such relationships as executor, administrator, trustee, and guardian;

(4) “financial interest” means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a “financial interest” in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.